

Letter of Findings: 04-20120700
Gross Retail Tax
For the Years 2009, 2010, and 2011

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ISSUE

I. Penalty – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer argues that the Department of Revenue should exercise its authority to abate a ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana business which operates a gas station and convenience store. The Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records. The audit resulted in the assessment of additional tax along with a "negligence" penalty. Taxpayer disagreed with the penalty and submitted a protest to that effect. Taxpayer was contacted in writing to schedule a hearing during which Taxpayer's representative would be provided an opportunity to explain the basis for the protest. Taxpayer chose not to participate in the hearing. This Letter of Findings has been prepared based upon Taxpayer's initial protest letter.

I. Penalty – Gross Retail Tax.

DISCUSSION

The Department determined that Taxpayer had failed to retain adequate documentation of its taxable sales. According to the audit report, "[T]axpayer was unable to provide any type of cash register Z tapes, point of sales system reports or any other types of sales documentation other than... worksheets prepared by the [T]axpayer." In addition, the audit found that Taxpayer had substantially understated its gasoline sales and overstated "the amount of the prepaid sales tax paid to their fuel supplier...."

Taxpayer explains that it was "into this kind of business for the first time [and] we inadvertently had made some mistakes [and] that is why this audit has resulted in such huge amounts."

The penalty was imposed pursuant to IC § 6-8.1-10-2.1(a) which states:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation [45 IAC 15-11-2\(b\)](#) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id.*

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2\(c\)](#) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Taxpayer is in the business of selling gasoline and convenience store items and has been doing so since 2006; however, Taxpayer's business records were not properly maintained, Taxpayer substantially underreported the amount of sales due, and over reported the amount of prepaid gas tax it paid its supplier. There is insufficient information to establish that Taxpayer exercised the "ordinary business care and prudence" expected of an

"ordinary reasonable taxpayer." [45 IAC 15-11-2](#)(b), (c). Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department is unable to agree that Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that the ten-percent negligence penalty should be abated.

FINDING

Taxpayer's protest is denied.

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